Supreme Court, U.S.
FILED
MAR 5 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

TERM, 1978

NO. 78-907

GERALD R. CAIN,
PETITIONER

v.

JOSEPH MAZURKIEWICZ

AND

THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA

AND

DISTRICT ATTORNEY OF PHILADELPHIA COUNTY,
RESPONDENTS

---

# BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

---

STEVEN H. GOLDBLATT
Deputy District Attorney for Law

PAUL S. DIAMOND
Assistant District Attorney

MICHAEL F. HENRY
Chief, Motions Division

EDWARD G. RENDELL
District Attorney

2400 Centre Square West

Philadelphia, Pennsylvania 19102

## INDEX





## TABLE OF CITATIONS

STATE CASES

## COUNTER-STATEMENT OF THE ISSUES PRESENTED

1. WAS PETITIONER CONSTITUTIONALLY ENTITLED TO A JURY INSTRUCTION ON VOLUNTARY MANSLAUGHTER WITHOUT AN EVIDENTIARY BASIS THEREFOR?
2. DID THE COURT BELOW ERR IN REFUSING TO ACCORD PETITIONER THE RETROACTIVE BENEFIT OF A NEW CONSTITUTIONAL RULING WHEN THAT RULING DID NOT AFFECT THE TRUTH-FINDING PROCESS?

## COUNTER-STATEMENT OF THE CASE

PETITIONER, GERALD R. CAIN, WAS CONVICTED OF MURDER, BURGLARY, AGGRAVATED ROBBERY, AND CONSPIRACY, ON INDICTMENT NOS. 2179-2182, JUNE SESSION, 1971, AFTER A TRIAL IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY BEFORE THE HONORABLE HOMER L. KREIDER AND A JURY. PETITIONER WAS SENTENCED TO LIFE IMPRISONMENT ON THE MURDER BILL, WITH SENTENCES ON THE OTHER CHARGES RUNNING CONCURRENTLY. AFTER TIMELY APPEAL TO THE PENNSYLVANIA SUPREME COURT, THAT COURT, BY AN EQUALLY DIVIDED VOTE, AFFIRMED THE JUDGMENT OF SENTENCE. COMMONWEALTH V. CAIN, 369 A.2D 1234 (PA. 1977).

SUBSEQUENTLY, PETITIONER SOUGHT A WRIT OF HABEAS CORPUS IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, DOCKETED AS CIVIL ACTION 77-2834. BY ORDER DATED JANUARY 11, 1978, THE PETITION WAS DENIED WITHOUT AN EVIDENTIARY HEARING, BY THE HONORABLE EDWARD N. CAHN, WHO HELD THAT THERE WAS PROBABLE CAUSE FOR APPEAL. PETITIONER APPEALED TO THE THIRD CIRCUIT, WHICH AFFIRMED JUDGE CAHN'S DECISION IN A JUDGMENT ORDER

DATED SEPTEMBER 7, 1978. ON SEPTEMBER 28, 1978, PETITIONER'S REQUEST FOR A REHEARING EN BANC WAS DENIED.

THE EVIDENCE PRESENTED AT PETITIONER'S TRIAL IN STATE COURT REVEALED THAT CHARLES GREEN AND THE DECEDENT, GLENN EDWARDS, CAME TO PHILADELPHIA BY PLANE ON MAY 22, 1971. BOTH MEN WERE COLLEGE STUDENTS AT CENTRAL STATE UNIVERSITY IN WILBERFORCE, OHIO. THE PURPOSE OF THEIR VISIT WAS TO BUY MARIJUANA AND RETURN TO WILBERFORCE. THEY EVENTUALLY CAME IN CONTACT WITH PETITIONER, GERALD CAIN, WHO TOLD THEM THAT HE COULD OBTAIN MARIJUANA FOR THEM. THEREAFTER, PETITIONER, ALONG WITH OTHERS, CONSPIRED TO LURE GLENN EDWARDS TO A VACANT HOUSE -- ON THE PRETENSE OF CONSUMMATING THE SALE -- IN ORDER TO ROB HIM. IN THE COURSE OF THE ROBBERY AND IN THE PRESENCE OF PETITIONER, GLENN EDWARDS WAS FATALLY SHOT BY CALVIN WILLIAMS, ONE OF THE CONSPIRATORS, SOME TIME AFTER MIDNIGHT ON MAY 24, 1971. THEREAFTER, PETITIONER SHARED IN THE PROCEEDS OF THE ROBBERY WITH HIS CONFEDERATES (N.T. 740-800, 888-916, 928-84, 1691-1702).

FOLLOWING THE DISCOVERY OF GLENN EDWARDS' BODY IN THE VACANT HOUSE ON MAY 25, 1971, AN INVESTIGATION LED TO THE ARREST OF PETITIONER ON MAY 26, 1971 (N.T. 1257-59). PETITIONER LATER MADE ORAL ADMISSIONS AND GAVE A FORMAL STATEMENT ADMITTING THAT HE WAS AWARE OF THE PLANNED ROBBERY (N.T. 127-72).

ON JULY 9, 1971, CALVIN WILLIAMS, THE ACTUAL SHOOTER, WAS ARRESTED. WILLIAMS TESTIFIED AT THE TRIAL THAT THERE WAS A CONSPIRACY BETWEEN HIMSELF, PETITIONER, AND OTHERS TO ROB THE DECEDENT, THAT THEY CARRIED OUT THE CONSPIRACY, AND THAT IN THE COURSE



OF THE ROBBERY AND IN THE PRESENCE OF PETITIONER, THE VICTIM WAS SHOT AND KILLED (N.T. 928-84).

## REASONS FOR DENYING THE WRIT

PETITIONER PRESENTS NO VIABLE GROUNDS FOR GRANTING HIS PETITION, WHICH SHOULD BE DENIED.

THE COURT BELOW CORRECTLY REFUSED TO RETROACTIVELY APPLY ITS DECISION IN UNITED STATES EX REL. MATTHEWS V. JOHNSON, 503 F.2D 339 (3D CIR. 1974) TO PETITIONER AS THE DECISION WAS INCORRECT.

EVEN IF MATTHEWS WAS CORRECTLY DECIDED, BECAUSE IT DID NOT IMPLICATE THE TRUTH-FINDING PROCESS, THE THIRD CIRCUIT PROPERLY APPLIED THE CASE IN A NON-RETROACTIVE FASHION.

FINALLY, PETITIONER WAS NOT HARMED BY THE COURT'S REFUSAL TO APPLY MATTHEWS TO HIS CASE.

### 1. PETITIONER WAS NOT ENTITLED, AS A MATTER OF CONSTITUTIONAL LAW, TO A JURY CHARGE ON VOLUNTARY MANSLAUGHTER ABSENT EVIDENCE OF PROVOCATION.

PETITIONER CONTENDS THAT HE WAS ENTITLED TO A JURY INSTRUCTION ON VOLUNTARY MANSLAUGHTER EVEN THOUGH NO EVIDENCE WAS PRESENTED AT TRIAL WHICH EVEN REMOTELY SHOWED PROVOCATION OR PASSION. SEE COMMONWEALTH V. HOFFMAN, 439 PA. 348, 356-357, 266 A.2D 726, 731 (1970). PETITIONER RAISED THIS POINT BEFORE THE PENNSYLVANIA SUPREME COURT IN HIS DIRECT APPEAL, WHICH WAS PENDING WHEN THAT

COURT DECIDED COMMONWEALTH V. JONES, 457 PA. 563, 319 A.2D 142 (1974), CERT. DENIED, 419 U.S. 1000 (HEREINAFTER: JONES). IN THAT CASE THE COURT ENDED THE LONGSTANDING PRACTICE OF ALLOWING TRIAL COURTS DISCRETION IN THEIR DECISION TO CHARGE ON VOLUNTARY MANSLAUGHTER IN THE ABSENCE OF AN EVIDENTIARY BASIS THEREFOR.[1]

SUBSEQUENT TO THE JONES DECISION, THE THIRD CIRCUIT RULED THAT THE CONSTITUTION REQUIRED TRIAL COURTS TO CHARGE ON VOLUNTARY MANSLAUGHTER UPON REQUEST, EVEN WHEN NO EVIDENCE WAS PRESENT WHICH WOULD JUSTIFY SUCH A CHARGE. UNITED STATES EX REL. MATTHEWS V. JOHNSON, 503 F.2D 339 (3D CIR. 1974), CERT. DENIED SUB. NOM. CUYLER V. MATTHEWS, 420 U.S. 952 (HEREINAFTER: MATTHEWS).[2] ALTHOUGH THREE MEMBERS OF THE COURT VOTED TO APPLY THE MATTHEWS HOLDING TO ALL CASES ON DIRECT APPEAL AT THE TIME OF THE DECISION, THE MAJORITY OF THE COURT DID NOT REACH THE ISSUE. ID. AT 346-347. IN A LATER

---

[1] THREE MEMBERS OF THE JONES COURT RULED THAT THE HOLDING WAS BASED UPON THE COURT'S SUPERVISORY POWERS. THE THREE JUSTICES FURTHER DETERMINED THAT THE RECORD WAS DEVOID OF ANY EVIDENCE WHICH SUGGESTED THAT THE DEFENDANT, JONES, WAS PREJUDICED BY THE ABSENCE OF A VOLUNTARY MANSLAUGHTER CHARGE. THREE MEMBERS OF THE COURT VOTED TO REVERSE JONES' CONVICTION, BASING THEIR DECISION ON CONSTITUTIONAL GROUNDS. AS THE COURT WAS EVENLY DIVIDED, THE JUDGMENT OF SENTENCE WAS AFFIRMED.

INTERESTINGLY, FORMER CHIEF JUSTICE JONES, WHO DID NOT PARTICIPATE IN THE JONES DECISION, VOTED AGAINST RETROSPECTIVE APPLICATION OF THE JONES HOLDING IN PETITIONER'S DIRECT APPEAL BELOW. COMMONWEALTH V. CAIN, 471 PA. 140, 369 A.2D 1234 (1977).

[2] MATTHEWS WAS NOT A RULING ON SUBSTANTIVE CRIMINAL LAW. RATHER, IT WAS AN ATTEMPT TO ELIMINATE ARBITRARINESS FROM CRIMINAL TRIALS. CONCEIVABLY, THEREFORE, THE DUE PROCESS REQUIREMENTS EXPRESSED IN MATTHEWS COULD BE SATISFIED IF NO PENNSYLVANIA MURDER DEFENDANT RECEIVED A VOLUNTARY MANSLAUGHTER CHARGE.



DECISION, UNITED STATES EX REL. CANNON V. JOHNSON, 536 F.2D 1013, 1015 (3D CIR. 1976), CERT. DENIED, 429 U.S. 928 (HEREINAFTER: CANNON), THE COURT HELD:

> MATTHEWS IS INAPPLICABLE TO PENDING AND/OR FUTURE APPEALS FROM PRE-MATTHEWS MURDER VERDICTS.[3]

IN DENYING THE INSTANT PETITION, THE THIRD CIRCUIT HAS REAFFIRMED THIS WELL-CONSIDERED DECISION. PETITIONER CONTENDS THAT THIS PROSPECTIVE APPLICATION OF MATTHEWS SOMEHOW VIOLATES HIS FOURTEENTH AMENDMENT RIGHTS. IT IS AXIOMATIC, HOWEVER, THAT A DEFENDANT MUST BE DENIED A FEDERALLY ACCORDED RIGHT BEFORE THE PROSPECTIVE APPLICATION OF THAT RIGHT MAY BE SAID TO VIOLATE DUE

---

[3] PETITIONER CONTENDS THAT THIS HOLDING WAS "DICTA" BECAUSE THE DEFENDANT IN CANNON WAS SEEKING COLLATERAL RELIEF. YET, PETITIONER RELIES UPON THE THREE JUDGE RETROACTIVITY "HOLDING" IN MATTHEWS, A CASE IN WHICH THE DEFENDANT WAS ALSO SEEKING COLLATERAL RELIEF.

PETITIONER'S ALLEGATIONS OF PREJUDICE REGARDING THE "DICTA" ARE UNCLEAR. MOREOVER, THEY ARE IRRELEVANT AS THE THIRD CIRCUIT'S DENIAL OF THE INSTANT PETITION AND ADOPTION OF JUDGE CAHN'S ORDER HAS TRANSFORMED THE "DICTA" INTO BINDING PRECEDENT.

MOREOVER, THE CANNON RULING ON DIRECT APPEALS AND RETROACTIVITY WAS NOT "DICTA." ON THE CONTRARY, IT WAS IN ACCORD WITH THIS COURT'S FORMULATION IN STOVALL V. DENNO, 388 U.S. 293, 300-301, 87 S. CT. 1967, 1972, 18 L.ED.2D 1199 (1967), THAT "NO DISTINCTION IS JUSTIFIED BETWEEN CONVICTIONS NOW FINAL . . . AND CONVICTIONS AT VARIOUS STAGES OF DIRECT REVIEW."

FINALLY, PETITIONER'S CONCERN THAT DEFENDANTS WILL LOSE INCENTIVE TO APPEAL THEIR CONVICTIONS IF NEW CONSTITUTIONAL RULINGS ARE MADE WHOLLY PROSPECTIVE IS ALSO IRRELEVANT AS NO NEW CONSTITUTIONAL RULING WAS ANNOUNCED IN CANNON OR THE INSTANT CASE. THE NEW RULINGS IN JONES AND MATTHEWS, ON THE OTHER HAND, APPLIED TO THE DEFENDANTS IN THOSE CASES.

PROCESS.[4] INSTANTLY, SINCE THE THIRD CIRCUIT ERRED IN MATTHEWS, PETITIONER COULD NOT HAVE BEEN PREJUDICED BY THE "PROSPECTIVE" APPLICATION OF THAT RULING.[5]

A. THE MATTHEWS DOCTRINE IS INCORRECT AS IT CONTRAVENES THE MOST BASIC CONCEPTS OF FEDERALISM AND UNDERCUTS THE JUDICIAL FUNCTION.

THE MATTHEWS HOLDING OFFENDS THE MOST BASIC PRINCIPLES OF FEDERALISM AS CLASSICALLY EXPRESSED BY MR. JUSTICE HOLMES IN MISSOURI, KANSAS, AND TEXAS RAILWAY CO. V. MAY, 194 U.S. 267, 270, 24 S. CT. 638, 639 (1904):

> GREAT CONSTITUTIONAL PRINCIPLES MUST BE ADMINISTERED WITH CAUTION. SOME PLAY MUST BE ALLOWED FOR THE JOINTS OF THE MACHINE, AND IT MUST BE REMEMBERED THAT LEGISLATURES ARE THE ULTIMATE GUARDIANS OF THE LIBERTIES AND WELFARE OF THE PEOPLE IN QUITE AS GREAT A DEGREE AS THE COURTS.

SEE KER V. STATE OF CALIFORNIA, 374 U.S. 23, 64-66, 83 S. CT. 1623, 1645-1646, 10 L.ED.2D 726 (1963) (CONCURRING OPINION OF HARLAN, J.).

IN REQUIRING A VOLUNTARY MANSLAUGHTER CHARGE IN EVERY MURDER TRIAL, THE THIRD CIRCUIT HAS PUT ALL PENNSYLVANIA TRIAL COURTS IN A

---

[4] AS FOOTNOTES 13 AND 14 MAKE CLEAR, THIS COURT HAS RULED ON THE RETROACTIVITY OF FEDERALLY MANDATED HOLDINGS ONLY.

[5] THE QUESTION OF THE RETROACTIVITY OF JONES IS NOT HERE IN ISSUE. MOREOVER, THE RETROACTIVITY OF A "STATE" ACCORDED RIGHT IS NOT A FEDERAL QUESTION. SEE OPINION OF CARDOZO, J., IN GREAT NORTHERN RY. CO. V. SUNBURST OIL AND REFINING CO., 287 U.S. 358, 363, 53 S. CT. 145, 148 (1932); CITED IN LINKLETTER, SUPRA, 381 U.S. AT 625, 85 S. CT. AT 1735.



"CONSTITUTIONAL STRAITJACKET." SUCH PRACTICE SHOULD BE CONDEMED BY THIS COURT.

MOREOVER, THE MATTHEWS COURT HELD THAT A TRIAL COURT MAY NOT, WITHIN THE CONFINES OF DUE PROCESS, EXERCISE DISCRETION ON TRIAL RULINGS UNLESS PROVIDED WITH SPECIFIC RULES FOR THE EXERCISE OF THAT DISCRETION, CITING GIACCIO V. PENNSYLVANIA, 382 U.S. 399, 86 S. CT. 518, 15 L.ED.2D 447 (1966). THIS CONCLUSION REPRESENTS AN UNWARRANTED EXTENSION OF THE LIMITED HOLDING IN GIACCIO, WHICH DEALT WITH THE POWER OF A JURY TO ASSESS A FINE FOR ANY UNSPECIFIED MISCONDUCT AND THE ABILITY OF AN ACCUSED TO DEFEND AGAINST UNNAMED AND ENTIRELY UNSPECIFIED CHARGES.

IN ADDITION, THE LOGICAL APPLICATIONS OF THE CONCLUSION WOULD SERIOUSLY IMPAIR THE FUNCTION OF EVERY TRIAL JUDGE. THROUGHOUT A TRIAL, PARTICULARLY A JURY TRIAL, THE COURT IS CALLED UPON TO MAKE COUNTLESS JUDGMENTS UPON ISSUES WHICH ARE VESTED IN HIS "SOUND DISCRETION." A PARTIAL LIST WOULD INCLUDE CONTINUANCE REQUESTS,[6] SEVERANCE REQUESTS,[7] VOIR DIRE,[8] LIMITATION OF CROSS-EXAMINATION, SEQUESTATION OF THE JURY, BAIL, AND SENTENCING. IN ALL OF THESE SITUATIONS NO SPECIFIC GUIDELINES ARE GIVEN TO THE TRIAL COURTS, OTHER THAN PERHAPS SOME MINIMUM STANDARD OF FAIRNESS DUE THE ACCUSED

---

[6] ALDRIDGE V. UNITED STATES, 283 U.S. 308 (1931); UNITED STATES V. COCKERHAM, 476 F.2D 542, 544 (D.C. CIR. 1973).

[7] UNITED STATES V. JENKINS, 496 F.2D 57, 67-68 (2D CIR. 1974).

[8] UNITED STATES V. TORBERT, 496 F.2D 154 (9TH CIR. 1974).

AND SOME SCATTERED CASES HOLDING THAT A DEFENDANT WAS NOT ENTITLED TO SOME PARTICULAR REQUEST WHICH WAS REFUSED HIM. MATTHEWS THROWS THIS JUDICIAL FUNCTION INTO QUESTION. TO A LARGE EXTENT THE ORDERLY CONTROL OF A TRIAL DEPENDS UPON THE EXERCISE OF DISCRETION OF THE TRIAL JUDGE, AND IN PARTICULAR UPON HIS ABILITY TO ACT WITH A WIDE DEGREE OF LATITUDE TO FIT THE RULING TO THE PARTICULAR CIRCUMSTANCES OF THE CASE. WIDESPREAD APPLICATION OF THE MATTHEWS RULING WOULD PRECLUDE THIS EXERCISE OF DISCRETION AND WOULD BODE OMINOUSLY FOR THE ORDERLY ADMINISTRATION OF CRIMINAL JUSTICE.

SINCE SOME TRIAL COURTS MAY GIVE THE CHARGE EVEN THOUGH OTHERS DO NOT WHEN THE EVIDENCE DOES NOT SUPPORT IT, THE MATTHEWS COURT REASONS THAT DUE PROCESS REQUIRES THAT ALL DEFENDANTS BE GIVEN THE CHARGE UPON REQUEST. THE DIFFICULTY WITH SUCH RELIEF LIES IN THE ESSENTIAL UNAPPEALABILITY OF RULINGS -- ERRONEOUS OR NOT -- FAVORABLE TO THE DEFENDANT, AND THE PRACTICE OF SOME TRIAL COURTS OF ERRING IN CLOSE CASES IN DEFENDANT'S FAVOR RATHER THAN RISKING REVERSAL ON APPEAL. BECAUSE OF THESE REALITIES, ANY SITUATION CALLING FOR THE EXERCISE OF DISCRETION WILL INEVITABLY RESULT IN SOME INSTANCES OF DEFENDANTS GETTING BEENFITS TO WHICH THEY ARE NOT BY LAW ENTITLED, BUT WHICH CANNOT BE APPEALED BY THE STATE.

IF EVERY TIME SUCH BENEFITS ARE GIVEN IN OCCASIONAL CASES, DUE PROCESS REQUIRES AN EXTENSION OF THE BENEFIT TO ALL DEFENDANTS, THE EVENTUAL RESULT WILL BE TO THROW THE SCALES OF JUSTICE FAR OUT OF BALANCE. AN "ERROR" WHICH UNFAIRLY BENEFITS THE ACCUSED WILL NOT BE CORRECTED, AND ULTIMATELY WILL BE EXTENDED TO ALL OTHERS. UNDER SUCH A SYSTEM, EXCESSES FAVORING THE STATE WOULD BE DISALLOWED,



BUT EXCESSES FAVORING THE DEFENDANT WOULD NOT ONLY GO UNCORRECTED, BUT WOULD BECOME THE STANDARD.

B. THE DECISION OF THE COURT IN MATTHEWS CONFLICTS WITH THE IMPLICIT HOLDINGS OF THIS COURT.

IN MATTHEWS, THE COURT HELD THAT:

> WE BELIEVE THAT THE SAFEGUARDS OF DUE PROCESS WILL BE SATISFIED ONLY WHEN ALL DEFENDANTS IN PENNSYLVANIA MURDER TRIALS ARE GIVEN THE SAME OPPORTUNITY, UPON REQUEST DULY MADE, TO HAVE A JURY RETURN A VERDICT OF VOLUNTARY MANSLAUGHTER AS WELL AS FIRST AND SECOND DEGREE MURDER.

ID. AT 346.

THIS RULING CONFLICTS WITH THE IMPLICIT HOLDING IN SPARF V. UNITED STATES, 156 U.S. 51 (1895). THERE, THIS COURT REJECTED A CLAIM ANALOGOUS TO THAT RAISED BY THE DEFENDANT IN MATTHEWS. MR. JUSTICE HARLAN OBSERVED:

> [I]N THIS CASE, IT WAS COMPETENT FOR THE COURT TO SAY TO THE JURY THAT, ON ACCOUNT OF THE ABSENCE OF ALL EVIDENCE TENDING TO SHOW THAT THE DEFENDANTS WERE GUILTY OF MANSLAUGHTER, THEY COULD NOT, CONSISTENTLY WITH LAW, RETURN A VERDICT OF GUILTY OF THAT CRIME.[9]

ID. AT 101. THE COURT OF APPEALS ATTEMPTED TO DISTINGUISH SPARF BY STATING:

---

[9] ADMITTEDLY, THE COURT IN SPARF DID NOT RULE ON THE SPECIFIC ISSUE OF WHETHER DUE PROCESS IS VIOLATED BY GRANTING TRIAL COURTS "UNFETTERED DISCRETION" IN THEIR CHARGING FUNCTION. AS THE LATE JUDGE KALODNER NOTED IN HIS MATTHEWS DISSENT, HOWEVER, THAT ISSUE IS IMPLICITLY REACHED IN SPARF. MATTHEWS AT 352-353. THUS, SPARF IS RELEVANT TO THIS COURT'S ANALYSIS OF THE INSTANT CASE.

> THE SUPREME COURT IN SPARE WAS CONFRONTED WITH ISSUES OF STATUTORY CONSTRUCTION ONLY.

MATTHEWS AT 343. THIS COURT IN SPARE, HOWEVER, DESCRIBED THE ISSUE PRESENTED AS BEING ONE OF CONSTITUTIONAL DIMENSION:

> BRIEFLY STATED, THE CONTENTION OF THE ACCUSED IS THAT, ALTHOUGH THERE MAY NOT HAVE BEEN ANY EVIDENCE WHATEVER TO SUPPORT A VERDICT OF GUILTY OF AN OFFENSE LESS THAN THE ONE CHARGED, -- AND SUCH WAS THE CASE HERE, -- YET, TO CHARGE THE JURY, AS MATTER OF LAW, THAT THE EVIDENCE IN THE CASE DID NOT AUTHORIZE ANY VERDICT EXCEPT ONE OF GUILTY OR ONE OF NOT GUILTY OF THE PARTICULAR OFFENSE CHARGED, WAS AN INTERFERENCE WITH THEIR LEGITIMATE FUNCTIONS, AND THEREFORE WITH THE CONSTITUTIONAL RIGHT OF THE ACCUSED TO BE TRIED BY A JURY.

SPARE, SUPRA AT 99.

THE PRINCIPLES UNDERLYING ITS HOLDING HAVE NOT BEEN ERODED OVER THE YEARS AND, INDEED, HAVE BEEN REAFFIRMED. BERRA V. UNITED STATES, 351 U.S. 131, 76 S. CT. 685, 100 L.ED. 1013 (1956); SANSONE V. UNITED STATES, 380 U.S. 343, 349-50, 85 S. CT. 1004, 13 L.ED.2D 882 (1965); KEEBLE V. UNITED STATES, 412 U.S. 205, 93 S. CT. 1993, 36 L.ED.2D 844 (1973). SEE BELTON V. UNITED STATES, 382 F.2D 150 (D.C. CIR. 1967); COMPARE UNITED STATES V. DOUGHERTY, 473 F.2D 1113 (D.C. CIR. 1972); UNITED STATES V. DELLINGER, 472 F.2D 340 (7TH CIR. 1972); UNITED STATES V. SIMPSON, 460 F.2D 515 (9TH CIR. 1972); UNITED STATES V. BOARDMAN, 419 F.2D 110 (1ST CIR. 1969), CERT. DENIED, 397 U.S. 991 (1970); UNITED STATES V. MOYLAN, 417 F.2D 1002 (4TH CIR. 1972); DRISCOLL V. UNITED STATES, 536 F.2D 324 (1ST CIR. 1966); UNITED STATES V. MARKIS, 352 F.2D 860 (2D CIR. 1965) (OPINION OF FRIENDLY, J.) (ALL REJECTING THE CONTENTION THAT A LESSER



INCLUDED OFFENSE MUST BE CHARGED ABSENT EVIDENCE OF THE LESSER CHARGE).

IN SUM, IT IS PLAIN THAT THE THIRD CIRCUIT'S RULING IN MATTHEWS WAS ERRONEOUS. THUS, THE FACT THAT THE BENEFIT OF THE MATTHEWS RULING WAS NOT EXTENDED RETROACTIVELY TO PETITIONER IS OF NO CONSEQUENCE.

## 2. THE THIRD CIRCUIT PROPERLY DENIED PETITIONER RETROACTIVE BENEFIT OF A NEW CONSTITUTIONAL HOLDING AS THAT HOLDING DID NOT AFFECT THE TRUTH DETERMINING PROCESS IN PETITIONER'S MURDER TRIAL.

SHOULD THIS COURT DETERMINE THAT MATTHEWS WAS CORRECTLY DECIDED, THE PROSPECTIVE APPLICATION OF THAT CASE WAS, NONETHELESS, PROPER. THUS, PETITIONER SUFFERED NO CONSTITUTIONAL PREJUDICE WHEN MATTHEWS WAS NOT APPLIED TO HIS CASE. IN REJECTING PETITIONER'S CLAIM BELOW, BOTH JUDGE CAHN AND THE PENNSYLVANIA SUPREME COURT RELIED STRONGLY UPON THE THIRD CIRCUIT'S REASONING IN CANNON AND JUDGE BECKER'S ANALYSIS IN UNITED STATES EX REL. CANNON V. JOHNSON, 396 F. SUPP. 1362 (E.D. PA. 1975) (HEREINAFTER: DIST. CANNON). IN SUM, EACH OF THE APPELLATE COURTS IN WHICH PETITIONER HAS LITIGATED HAS FOLLOWED THE GUIDELINES SET OUT BY THIS COURT IN DANIEL V. LOUISIANA, 419 U.S. 31, 32, 95 S. CT. 704, 705, 42 L.ED.2D 790 (1975).[10] SEE

[10] INDEED, JUDGE WEIS CONCURRED IN THE RETROACTIVITY RULING IN CANNON, REVERSING HIS DECISION IN MATTHEWS, BASED ON THIS COURT'S DECISION IN DANIEL V. LOUISIANA, SUPRA. CANNON AT 1017.

Stovall v. Denno, supra; Linkletter v. Walker, 381 U.S. 618, 85 S. Ct. 1731, 14 L.Ed.2d 601 (1965). In determining whether retroactive application is to be accorded a newly mandated constitutional standard for criminal procedure, this Court has called for the consideration of three criteria:

> (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards.

Cannon at 1015, citing Stovall, supra at page 297, 87 S. Ct. at 1969).[11] The courts which have considered the issue agree that the purpose of the Matthews rule was the elimination of possible arbitrariness from the judicial process, and that the rule in no way implicated the truth finding process. Cannon at 1016; Matthews at 348; Dist. Cannon at 1367; Commonwealth v. Cain, supra at 1245; Commonwealth v. Jones, supra at 149. It is well-settled that the above-described reliance and burden factors become controlling once it is determined that the purpose of the new rule does not implicate the truth-finding process. Williams v. United States, 401 U.S. 646, 653, 91 S. Ct. 1148, 1152, 28 L.Ed.2d 388 (1971); Desist v. United States, 394 U.S. 244, 249, 89 S. Ct. 1030, 1033,

[11] This Court has recently reaffirmed this retroactivity standard. Hankerson v. North Carolina, 432 U.S. 233, 97 S. Ct. 2339, 2345, 53 L.Ed.2d 306, (1977).



22 L.Ed.2d 248 (1969); Cannon at 1016; see also Brown v. United States, 422 U.S. 916, 916, 95 S. Ct. 2569, 2572, 45 L.Ed.2d 641 (1975); United States v. Peltier, 422 U.S. 531, 535, 95 S. Ct. 2313, 2316, 45 L.Ed.2d 374 (1975). An examination of the law prior to Commonwealth v. Jones, supra, makes plain that the courts of Pennsylvania relied heavily on the "old standards," which were repeatedly reaffirmed by the Pennsylvania Supreme Court: See, Brown v. Commonwealth, 76 Pa. 319, 339 (1874); Clark v. Commonwealth, 123 Pa. 555, 575, 16 A. 795, 799 (1888); Commonwealth v. Buccieri, 153 Pa. 535, 26 A. 228 (1893); Commonwealth v. Crossmire, 156 Pa. 304, 27 A. 40 (1893); Commonwealth v. Eckerd, 174 Pa. 137, 34 A. 305 (1896); Commonwealth v. MacMurray, 198 Pa. 51, 47 A. 952 (1901); Commonwealth v. Sutton, 205 Pa. 605, 55 A. 781 (1903); Commonwealth v. Curcio, 216 Pa. 380, 65 A. 792 (1907); Commonwealth v. LeGrange, 227 Pa. 368, 76 A. 63 (1910); Commonwealth v. Morrison, 266 Pa. 223, 109 A. 878 (1920); Commonwealth v. Pava, 268 Pa. 520, 112 A. 103 (1920); Commonwealth v. Spardute, 278 Pa. 37, 122 A. 161 (1923); Commonwealth v. Meleskie, 278 Pa. 37, 122 A.2d 161 (1923); Commonwealth v. Robinson, 305 Pa. 302, 157 A. 689 (1931); Commonwealth v. Yeager, 329 Pa. 81, 196 A. 827 (1938); Commonwealth v. Flax, 331 Pa. 145, 200 A. 632 (1938); Commonwealth v. LaRue, 381 Pa. 113, 112 A.2d 362 (1955); Commonwealth v. Foster, 364 Pa. 288, 72 A.2d 279 (1950); Commonwealth v. Pavillard, 421 Pa. 571, 220 A.2d 807 (1966); Commonwealth v. Dews, 429 Pa. 555, 239 A.2d 392 (1968); Commonwealth v. Corbin, 432 Pa. 551, 247 A.2d 584 (1968); Commonwealth v. Heckathorn, 429 Pa. 534, 241 A.2d 97 (1968);

COMMONWEALTH V. BANKS, 447 PA. 356, 285 A.2D 112 (1971); COMMONWEALTH V. KENNEY, 449 PA. 562, 297 A.2D 794 (1972); COMMONWEALTH V. DAVIS, 449 PA. 468, 297 A.2D 817 (1972), CERT. DENIED, 414 U.S. 836 (1973); COMMONWEALTH V. JONES, 450 PA. 442, 299 A.2D 288 (1973); COMMONWEALTH V. CANNON, 453 PA. 389, 309 A.2D 384 (1973). IN ADDITION, THE STATE COURTS RELIED UPON NUMEROUS FEDERAL PRECEDENTS UPHOLDING AN ANALOGOUS PRACTICE, FROM WHICH MATTHEWS REPRESENTED A BREAK. SEE SPARF V. UNITED STATES, SUPRA, REAFFIRMED IN BERRA V. UNITED STATES, SUPRA; SANSONE V. UNITED STATES, SUPRA; AND KEEBLE V. UNITED STATES, SUPRA. SEE ALSO BELTON V. UNITED STATES, 382 F.2D 150 (D.C. CIR. 1967); UNITED STATES V. MARKIS, 352 F.2D 860 (2D CIR. 1965); DRISCOLL V. UNITED STATES, 356 F.2D 324 (1ST CIR. 1966); UNITED STATES V. ENOS, 453 F.2D 342 (9TH CIR. 1972); UNITED STATES EX REL. VICTOR V. YEAGER, 300 F. SUPP. 802 (D.N.J. 1971); VIRGIN ISLANDS V. CARMONA, 422 F.2D 95 (3D CIR. 1970).

AS JUDGE BECKER'S OPINION IN DIST. CANNON MAKES ABUNDANTLY CLEAR, RETROACTIVE APPLICATION OF MATTHEWS WOULD HAVE DISASTROUS EFFECTS ON THE ADMINISTRATION OF JUSTICE IN PENNSYLVANIA. ID. AT 1365-71).[12] CONTRARY TO PETITIONER'S ASSERTIONS, THIS WOULD NOT BE A MERE "ADMINISTRATION BURDEN," WHICH THE PENNSYLVANIA SUPREME COURT COULD HANDLE WITH "PER CURIAM OPINIONS." RATHER, RETROSPECTIVE APPLICATION OF MATTHEWS WOULD RESULT IN WHOLESALE REVERSAL OF

[12] MR. CHIEF JUSTICE (THEN JUSTICE) EAGEN WROTE: "A HORRENDOUS BURDEN WOULD BE PLACED ON THE ADMINISTRATION OF JUSTICE WERE WE TO APPLY MATTHEWS TO CASES ON DIRECT REVIEW. . . ." COMMONWEALTH V. CAIN, SUPRA AT 1246; SEE CANNON AT 1016.



HUNDREDS OF MURDER CONVICTIONS WHICH WERE PROPERLY OBTAINED IN RELIANCE UPON EXTREMELY WELL-SETTLED PRECEDENT. IN LIGHT OF THIS APPALLING BURDEN, THE RELIANCE ON THE OLD STANDARDS BY THE STATE COURTS, AND THE PURPOSE OF THE MATTHEWS RULE, THE THIRD CIRCUIT'S DECISION TO APPLY MATTHEWS PROPSECTIVELY IS UNASSAILABLE.

PETITIONER EXPRESSES AN OBSCURE FEAR THAT THE THIRD CIRCUIT HAS CREATED A NEW STANDARD WHICH WOULD RESULT IN WHOLLY PROSPECTIVE OR RETROACTIVE APPLICATIONS OF NEW CONSTITUTIONAL RULINGS. THIS IS LITTLE MORE THAN PETITIONER'S THINLY VEILED BELIEF THAT THIS COURT SHOULD NOW REJECT ITS THREE PRONG RETROACTIVITY TEST. SUCH A CONTENTION IS OBVIOUSLY UNACCEPTABLE. THE TEST, WHICH WAS FOLLOWED BY THE THIRD CIRCUIT BELOW AND IN CANNON, HAS BEEN REPEATEDLY APPLIED BY THIS COURT IN CASES INVOLVING RULINGS WHICH AFFECT THE TRUTH-DETERMINING PROCESS[13] AND THOSE WHICH DO

[13] HANKERSON V. NORTH CAROLINA, SUPRA (PROSECUTION MUST DISPROVE SELF-DEFENSE TO MEET ITS BURDEN IN A MURDER PROSECUTION; HOLDING IS FULLY RETROACTIVE); ROBINSON V. NEIL, 409 U.S. 505, 93 S. CT. 876, 36 L.ED.2D 736 (1973) (DOUBLE JEOPARDY HOLDING IN WALLER V. FLORIDA, 397 U.S. 387, 90 S. CT. 1184, 25 L.ED. 435 (1970) APPLIED RETROACTIVELY); IVAN V. CITY OF NEW YORK, 407 U.S. 203, 92 S. CT. 1951, 32 L.ED.2D 659 (1972) (IN RE WINSHIP, 397 U.S. 358, 90 S. CT. 1068, 25 L.ED.2D 368 (1970) APPLIED RETROACTIVELY); UNITED STATES V. U.S. COIN AND CURRENCY, 401 U.S. 715, 91 S. CT. 1041, 28 L.ED.2D 434 (1971) (MARCHETTI V. UNITED STATES, 390 U.S. 39, 88 S. CT. 697, 19 L.ED.2D 889 (1968) AND GROSSO V. UNITED STATES, 390 U.S. 62, 88 S. CT. 709, 19 L.ED.2D 906 (1968), APPLIED RETROACTIVELY TO FORFEITURE PROCEEDINGS UNDER 26 U.S.C. § 7302); BERGER V. CALIFORNIA, 393 U.S. 314, 89 S. CT. 540, 21 L.ED.2D 508 (1968) (BARBER V. PAGE, 390 U.S. 719, 88 S. CT. 1318, 20 L.ED.2D 255 (1968), RIGHT TO CONFRONTATION HOLDING APPLIED RETROACTIVELY); ARSENAULT V. MASSACHUSETTS, 393 U.S. 5, 89 S. CT. 35, 21 L.ED.2D 193 (1963) INSURING

(FOOTNOTE 13 CONTINUED ON NEXT PAGE.)

NOT,[14] WITH VARYING DEGREES OF RETROACTIVITY ACCORDED TO EACH. PETITIONER HAS PRESENTED NO NEW OR VIABLE REASONS TO REJECT THIS THOUGHTFUL AND WELL-SETTLED STANDARD.

---

(FOOTNOTE 13 CONTINUED FROM PREVIOUS PAGE.)

RIGHT TO COUNSEL AT PRELIMINARY HEARING WHEN A PLEA IS ENTERED, IS MADE FULLY RETROACTIVE); McCONNELL V. RHAY, 393 U.S. 2, 89 S. CT. 32, 21 L.ED.2D 2 (1968) (HOLDING DEMPA V. RHAY, 389 U.S. 128, 88 S. CT. 254, 19 L.ED.2D 336 (1967), INSURING RIGHT TO COUNSEL AT SENTENCING, FULLY RETROACTIVE); ROBERTS V. RUSSELL, 392 U.S. 293, 88 S. CT. 1921, 20 L.2D 1100 (1968) (HOLDING BRUTON V. UNITED STATES, 391 U.S. 123, 88 S. CT. 1620, 20 L.ED.2D 476 (1968) FULLY RETROACTIVE); WITHERSPOON V. ILLINOIS, 391 U.S. 510, 88 S. CT. 1770, 20 L.ED.2D 776 (1968) (VOIR DIRE OF POTENTIAL JURORS CONCERNING THE DEATH PENALTY HOLDING FULLY RETROACTIVE); SMITH V. CROUSE, 378 U.S. 584, 84 S. CT. 1919, 12 L.ED.2D 1039 (1964) (HOLDING DOUGLAS V. CALIFORNIA, 372 U.S. 353, 83 S. CT. 814, 9 L.ED.2D 811 (1963) FULLY RETROACTIVE); DOUGHTY V. MAXWELL, 376 U.S. 202, 84 S. CT. 202, 11 L.ED.2D 650 (1964) (HOLDING GIDEON V. WAINWRIGHT, 372 U.S. 335, 83 S. CT. 792, 9 L.ED.2D 769 (1963) FULLY RETROACTIVE).

[14] UNITED STATES V. PELTIER, SUPRA (ALMEIDA-SANCHEZ V. UNITED STATES, 413 U.S. 265, 93 S. CT. 2535, 37 L.ED.2D 596 (1973) IS HELD WHOLLY PROSPECTIVE); DANIEL V. LOUISIANA, SUPRA (JURY SELECTION HOLDING IN TAYLOR V. LOUISIANA, 419 U.S. 522, 95 S. CT. 692, 42 L.ED.2D 690 (1975) HELD NOT APPLICABLE TO CONVICTIONS OBTAINED BY JURIES EMPANELLED PRIOR TO THE DATE OF DECISION IN TAYLOR); HAMLING V. UNITED STATES, 418 U.S. 87, 94 S. CT. 2887, 41 L.ED.2D 590 (1974) (DEFINITION OF OBSCENITY IN MILLER V. CALIFORNIA, 413 U.S. 15, 93 S. CT. 2607, 37 L.ED.2D 419 (1973) APPLIED TO SOME CASES ON DIRECT APPEAL AT THE TIME OF MILLER); GOSA V. MAYDEN, 413 U.S. 665, 93 S. CT. 2926, 37 L.ED.2D 873 (1973) (HOLDING OF O'CALLAHAN V. PARKER, 395 U.S. 258, 89 S. CT. 1683, 23 L.ED.2D 291 (1969), REGARDING CIVILIAN CRIMINAL PROCEDURES FOR SERVICEMEN IS PROSPECTIVE); MICHIGAN V. PAYNE, 412 U.S. 47, 93 S. CT. 1966, 36 L.ED.2D 736 (1973) (RESENTENCING STANDARDS IN NORTH CAROLINA V. PEARCE, 395 U.S. 711, 89 S. CT. 2072, 23 L.ED.2D 656 (1969) IS APPLICABLE TO SENTENCES IMPOSED AFTER THE PEARCE RULING); ADAMS V. ILLINOIS, 405 U.S. 278, 92 S. CT. 916, 31 L.ED.2D 202 (1972) (RIGHT TO COUNSEL AT PRELIMINARY HEARING AS ARTICULATED IN COLEMAN V. ALABAMA, 399 U.S. 1, 90 S. CT. 1999, 26 L.ED.2D 387 (1970) RETROACTIVE ONLY TO PRELIMINARY HEARINGS HELD AFTER COLEMAN);

(FOOTNOTE 14 CONTINUED ON NEXT PAGE.)



NOR HAS PETITIONER SHOWN THAT THE DECISION BELOW IS IN CONFLICT WITH THE DECISION OF ANY OTHER CIRCUIT COURT. ON THE CONTRARY, THE

---

(FOOTNOTE 14 CONTINUED FROM PREVIOUS PAGE.)

MACKEY V. UNITED STATES, 401 U.S. 667, 91 S. CT. 1160, 28 L.ED.2D 404 (1971) (FIFTH AMENDMENT DEFENSE TO TAX CHARGES, AS ARTICULATED IN MARCHETTI V. UNITED STATES, 390 U.S. 39, 88 S. CT. 697, 19 L.ED.2D 889 APPLIED PROSPECTIVELY TO TRIALS OCCURRING AFTER DATE OF MARCHETTI); WILLIAMS V. UNITED STATES, 401 U.S. 646, 91 S. CT. 1148, 28 L.ED.2D 388 (1971) (HOLDING OF CHIMEL V. CALIFORNIA, 395 U.S. 752, 89 S. CT. 2034, 23 L.ED.2D 685 (1969) REGARD SCOPE OF SEARCH INCIDENT TO AN ARREST IS APPLIED PROSPECTIVELY ONLY TO SEARCHES OCCURRING OF THE DATE OF CHIMEL); HALLIDAY V. UNITED STATES, 394 U.S. 831, 89 S. CT. 1498, 23 L.ED.2D 16 (1969) (REQUIREMENT OF ON THE RECORD GUILTY PLEA COLLOQUY AS ARTICULATED IN MCCARTHY V. UNITED STATES, 394 U.S. 459, 89 S. CT. 1166, 22 L.ED2D 418 (1969) APPLIED ONLY TO THOSE PLEAS ENTERED INTO AFTER DATE OF MCCARTHY); DESIST V. UNITED STATES, 394 U.S. 244, 89 S. CT. 1030, 22 L.ED.2D 248 (1969) (KATZ V. UNITED STATES, 389 U.S. 347, 88 S. CT. 507, 19 L.ED.2D 576 (1967), HOLDING THAT ELECTRONIC EAVESDROPPING CONSTITUTES A "SEARCH," APPLIED ONLY TO SEARCHES AFTER DATE OF DECISION); FULLER V. ALASKA, 393 U.S. 80, 89 S. CT. 61, 21 L.ED.2D 212 (1968) (HOLDING IN LEE V. FLORIDA, 392 U.S. 378, 88 S. CT. 2096, 20 L.ED.2D 1166 (1968) REGARDING INADMISSIBILITY IN STATE COURTS OF EVIDENCE OBTAINED THROUGH ILLEGAL WIRETAPS APPLIED TO TRIAL OCCURRING AFTER THE DECISION IN LEE); DESTEFANO V. WOODS, 392 U.S. 631, 88 S. CT. 2093, 20 L.ED.2D 1308 (1968) (DUNCAN V. LOUISIANA, 391 U.S. 145, 88 S. CT. 1444, 20 L.ED.2D 491 (1968), INSURING A RIGHT TO A JURY TRIAL, APPLIED TO TRIALS OCCURRING AFTER THE DATE OF DUNCAN); STOVALL V. DENNO, SUPRA (APPLIED UNITED STATES V. WADE, 388 U.S. 218, 87 S. CT. 1926, 18 L.ED.2D 1149 (1967) -- RIGHT TO COUNSEL AT LINEUPS -- TO LINEUPS OCCURRING AFTER THE DATE OF DECISION IN WADE); JOHNSON V. NEW JERSEY, 384 U.S. 719, 86 S. CT. 1772, 16 L.ED.2D 882 (1966) (HOLDING MIRANDA V. ARIZONA, 384 U.S. 436, 86 S. CT. 1602, 16 L.ED.2D 694 (1966) AND ESCOBEDO V. ILLINOIS, 378 U.S. 478, 84 S. CT. 1758, 12 L.ED.2D 977 (1964) APPLICABLE TO TRIALS OCCURRING ON OR AFTER THE DATES OF DECISION OF MIRANDA AND ESCOBEDO); IEHAN V. UNITED STATES EX REL. SHOTT, 382 U.S. 406, 86 S. CT. 459, 15 L.ED.2D 453 (1966) (HOLDING NON-RETROACTIVE GRIFFIN V. CALIFORNIA, 380 U.S. 609, 85 S. CT. 1229, 14 L.ED.2D 106 (1965), WHICH PROHIBITED ADVERSE COMMENT ON A DEFENDANT'S FAILURE TO TESTIFY AT TRIAL); LINKLETTER V. WALKER, SUPRA (MAPP V. OHIO, 367 U.S. 643, 81 S. CT. 1684, 6 L.ED.2D 1081 (1961) IS APPLICABLE ONLY TO CASES ON DIRECT APPEAL AT THE TIME OF THE MAPP DECISION).

RETROACTIVITY STANDARD USED BELOW HAS BEEN FOLLOWED BY ALL THE CIRCUITS, WITH NO CONFLICT AMONG THEM ON THIS POINT.[15]

IN SUM, IT IS CLEAR THAT THE DECISION OF THE COURT BELOW WAS IN FULL COMPLIANCE WITH THIS COURT'S WELL-SETTLED RETROACTIVITY GUIDELINES AND IN ACCORD WITH THE STANDARD USED BY ALL THE CIRCUITS.[16]

---

[15] UNITED STATES V. BRACKETT, 567 F.2D 501 (D.C. 1977), CERT. DENIED, 98 S. CT. 1505; JACKSON V. JUSTICES OF THE SUPERIOR COURT OF MASSACHUSETTS, 549 F.2D 215 (1ST CIR. 1977), CERT. DENIED, 430 U.S. 975; UNITED STATES V. REDA, 563 F.2D 510 (2D CIR. 1977), CERT. DENIED, 98 S. CT. 1617, REHEARING DENIED 98 S. CT. 2275; UNITED STATES V. ALLEN, 542 F.2D 630 (4TH CIR. 1976), CERT. DENIED, 430 U.S. 908; WATSON V. UNITED STATES, 484 F.2D 34 (5TH CIR. 1973), CERT. DENIED, 416 U.S. 940; HOLT V. BLACK, 550 F.2D 1061 (6TH CIR. 1977), CERT. DENIED, 97 S. CT. 2960; UNITED STATES V. DORSZYNSKI, 524 F.2D 190 (7TH CIR. 1975), CERT. DENIED, 424 U.S. 977; MARTIN V. WYRICK, 568 F.2D 583 (8TH CIR. 1978), CERT. DENIED, 98 S. CT. 1623; UNITED STATES V. ESCALANTE, 554 F.2D 940 (9TH CIR. 1978), CERT. DENIED, 43 U.S. 862; SCHLOMAN V. MOSELEY, 457 F.2D 1223 (10TH CIR. 1972), CERT. DENIED, 413 U.S. 919.

[16] IF THIS COURT DETERMINES THAT THE FAILURE TO CHARGE ON VOLUNTARY MANSLAUGHTER VIOLATED PETITIONER'S DUE PROCESS RIGHTS, SUCH ERROR WAS CERTAINLY HARMLESS BEYOND A REASONABLE DOUBT. THE JURY BELOW RETURNED A VERDICT OF FIRST DEGREE MURDER AGAINST PETITIONER. SURELY, IF THE JURY WAS INCLINED TO SHOW ANY MERCY FOR PETITIONER, IT WOULD HAVE FOUND PETITIONER GUILTY ONLY OF SECOND DEGREE MURDER. THIS WAS THE APPROACH TAKEN BY THE PENNSYLVANIA SUPREME COURT IN JONES. CITING SCHNEBLE V. FLORIDA, 405 U.S. 328, 92 S. CT. 1056, 31 L.ED.2D 340 (1972), THE MATTHEWS COURT REJECTED THE HARMLESS ERROR ARGUMENT. ID. AT 346. YET, IN SCHNEBLE, THE COURT WROTE: "JUDICIOUS APPLICATION OF THE HARMLESS ERROR RULE DOES NOT REQUIRE THAT WE INDULGE ASSUMPTIONS OF IRRATIONAL JURY BEHAVIOR." 405 U.S. AT 431-432; 92 S. CT. AT 1059. IN LIGHT OF THE OVERWHELMING EVIDENCE OF FIRST DEGREE MURDER PRESENTED AT TRIAL BELOW, AND THE FAILURE OF THE JURY TO RETURN A VERDICT OF SECOND DEGREE MURDER, AN INSTRUCTION ON VOLUNTARY MANSLAUGHTER COULD NOT, RATIONALLY, HAVE AFFECTED THE JURY. THUS, THE RECORD MAKES PLAIN THAT PETITIONER WAS NOT PREJUDICED BY THE OMITTED CHARGE. CHAPMAN V. CALIFORNIA, 386 U.S. 18, 87 S. CT. 824, 17 L.ED. 705 (1967).



THUS, PETITIONER HAS PRESENTED NO "SPECIAL OR IMPORTANT REASONS" FOR GRANTING HIS PETITION, WHICH SHOULD BE DENIED. U.S. SUP. CT. RULE 19, 28 U.S.C.A.; RICE V. SIOUX CITY MEMORIAL CEMETERY, 349 U.S. 70, 75 S. CT. 614, 99 L.ED. 897 (1955).

## CONCLUSION

FOR THE FOREGOING REASONS, RESPONDENTS RESPECTFULLY REQUEST THAT THE COURT NOT ISSUE A WRIT OF CERTIORARI TO REVIEW THE DECISION BELOW.

RESPECTFULLY SUBMITTED,

STEVEN H. GOLDBLATT
DEPUTY DISTRICT ATTORNEY FOR LAW

PAUL S. DIAMOND
ASSISTANT DISTRICT ATTORNEY

MICHAEL F. HENRY
CHIEF, MOTIONS DIVISION

EDWARD G. RENDELL
DISTRICT ATTORNEY

2400 CENTRE SQUARE WEST
PHILADELPHIA, PENNSYLVANIA 19102



IN THE SUPREME COURT OF THE UNITED STATES

| | | |
|---|---|---|
| GERALD R. CAIN, PETITIONER | : | TERM, 1978 |
| V. | : | |
| JOSEPH MAZURKIEWICZ | : | |
| AND | : | |
| THE ATTORNEY GENERAL OF PENNSYLVANIA | : | |
| AND | : | |
| THE DISTRICT ATTORNEY OF PHILADELPHIA COUNTY, RESPONDENTS | : | NO. 78-907 |

## CERTIFICATION OF SERVICE

I, STEVEN H. GOLDBLATT, ESQUIRE, COUNSEL FOR RESPONDENTS, HEREBY CERTIFY THAT I HAVE CAUSED A COPY OF THIS BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT TO BE SERVED UPON MORRIS BARAN, ESQUIRE, ATTORNEY FOR PETITIONER, BY DEPOSITING FIVE COPIES IN THE UNITED STATES MAIL, FIRST CLASS, POSTAGE PREPAID, ADDRESSED TO MORRIS PAUL BARAN, ESQUIRE, 600 PENN SQUARE BUILDING, 1317 FILBERT STREET, PHILADELPHIA, PENNSYLVANIA, 19107, ON MARCH 1, 1979.

STEVEN H. GOLDBLATT

SWORN TO AND SUBSCRIBED :
BEFORE ME THIS DAY :
OF MARCH A.D. 1979 :

NOTARY PUBLIC